1996

State of Utah v. Randolph Paul Struhs : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	
Plaintiff/Appellee,	
v.	Case No. 960416-CA
RANDOLPH PAUL STRUHS,	Priority No. 2
Defendant/Appellant.	**ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

Appeal from Judgment based upon a conditional plea of guilty, pursuant to *State v. Sery*, of the offense of Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), in the Second Judicial District Court in and for Davis County, the Honorable Jon M. Memmott presiding.

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ARGUMENT

1. BASED ON THE TOTALITY OF THE CIRCUMSTANCES, DEFENDANT WAS SEIZED WHEN OFFICER KNIGHTON AND HER PARTNER, IN THEIR OFFICIAL CAPACITY, APPROACHED DEFENDANT'S VEHICLE - WITH LIGHTS OUT - AND THEN, WHEN "NOSE TO NOSE" WITH DEFENDANT'S VEHICLE, SUDDENLY ACTIVATED THE "TAKEDOWN LIGHTS" AND THE HIGH-BEAM HEADLIGHTS OF THE PATROL VEHICLE ONTO DEFENDANT'S VEHICLE.

The State, in its Brief, argues that "Deputy Knighton's action constituted a permissible 'level one' police-citizen encounter, as discussed by the Supreme Court in *Terry v. Ohio*, 88 S.Ct. 1868 (1968)." Brief of Appellee, p. 9. In the course of so arguing, the State claims that "Defendant's analysis is marred by omission of a

critical fact related to the distance between the parked vehicles,[1] and by the nature of the lights[2] used by the deputy." *Id.* at 10.

The State's analysis, however, is marred by its failure to consider the totality of the circumstances surrounding the Officers' conduct in the course of confronting Defendant's vehicle. *See State v. Smith*, 781 P.2d 879, 881 (Utah 1989) ("Characterization of the encounter . . . must be determined by examining the totality of the circumstances"). According to the State, there was no seizure

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[1]The State's fixation upon the statement by Officer Knighton that the patrol vehicle, in the "nose to nose" position with Defendant's vehicle, was "maybe a car length or so away" from Defendant's vehicle is a factor to be considered in the totality of the circumstances review of the encounter. *See United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1876 (1980). While the distance between the noses of the cars in and of itself may not indicate a seizure, the totality of the circumstances of the confrontational posture utilized by Officer Knighton and her partner together with the manner in which the "take down" lights and high-beam headlights were activated upon Defendant's vehicle, among other factors, constitutes a seizure.

[2]The State, in its Brief, attempts to mitigate the show of authority utilized by Officer Knighton and her partner when the Officers activated both the high-beam headlights and "takedown lights" of the patrol vehicle onto Defendant's vehicle in a "nose to nose" position with Defendant's vehicle, which had been backed up against the barricades or signs surrounding the construction area. In short, the State argues that the illumination of an area by officers is not a show of authority sufficient to constitute a seizure. Again, the State fails to consider the totality of the circumstances surrounding the encounter between Defendant and the Officers. Defendant agrees that the illumination, by itself, may not be enough to constitute a seizure. However, when the totality of the circumstances of the encounter set forth below are considered with the activation of the high-beam headlights and "takedown lights," as they should be, there was a seizure. Interestingly, Officer Knighton, in the course of her testimony at the suppression hearing, referred to the lights on the patrol vehicle utilized in the course of the encounter with Defendant as "takedown lights" (R. 49, lines 13-17; and R. 53, lines 8-10).

because the marked patrol vehicle was "maybe a car length or so away" when the Officers' parked the patrol vehicle "nose to nose" with Defendant's vehicle and therefore it was possible for Defendant "to drive around the patrol car."[3]

A seizure occurs when an officer "by means of physical force or show of authority has in some way restricted the liberty of a person." *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987) (citing *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1876 (1980) (citing *Terry v. Ohio*, 392 U.S. 1, 19, n.16, 88 S.Ct. 1868, 1879, n.16 (1968)). "When a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation with the officer's investigation, but because he believes he is not free to leave a seizure occurs." *Id.* (citing *Mendenhall*, 446 U.S. at 555, 100 S.Ct. at 1877).

The totality of the circumstances of the encounter between Officer Knighton, her partner, and Defendant are as follows:

1. On March 3, 1995, at approximately 9:58 p.m., Officer Knighton, a Deputy Paramedic with the Davis County Sheriff's Office (R. 47), and her partner were patrolling westbound on Center Street in North Salt Lake (R. 8-11);
2. In the course of patrolling, Officer Knighton observed Defendant's truck traveling westbound on Center Street "half a mile or so" ahead of the patrol vehicle (R. 48, lines 13-14);

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[3]The State's argument presupposes that there must be a complete blockage of Defendant's vehicle to constitute a seizure. However, in *People v. Guy*, 329 N.W.2d 435 (Mich. App. 1982), which was cited by this Court as supporting authority in *State v. Smith*, 781 P.2d 879, 882 n.3 (Utah App. 1989), the Michigan Court of Appeals held that a partial blockage of the driveway and subsequent visit to the defendant's vehicle constituted a seizure. *Id.* at 440.

3. The area being patrolled was an open field area with some construction taking place on a bridge where Center Street and the Jordan River intersect (R. 47-48);
4. As Defendant's truck approached the construction area, Officer Knighton "became curious to know where they were going down there" (R. 48, lines 13-17);
5. Officer Knighton observed Defendant's truck turn and back up towards the barricades or signs surrounding the construction area so that the truck faced east (R. 48, lines 17-19, R. 51, lines 21-22), after which Defendant stopped the truck and turned off the headlights (R. 48, lines 17-18). The construction vehicles and supplies located in the construction area were located approximately two hundred feet away from the area where Defendant stopped his truck (R. 51, lines 1-13);
6. At no time did Defendant or any of his co-passengers ever exit Defendant's truck and go towards the construction area (R. 52, lines 14-19);
7. The Officers proceeded to Defendant's location "to determine why the individual had stopped there" (R. 48, lines 22-23). As they proceeded, Officer Knighton had a "suspicion" of criminal activity (R. 51-52, Transcript of Suppression Hearing), which, according to her testimony, was based on the construction equipment located in the general vicinity, the lateness of the hour, *i.e.*, 9:58 p.m., and that criminal activity often occurs in that area (R. 54);
8. In the course of proceeding to Defendant's location, Officer Knighton turned off all of the lights on the patrol vehicle (R. 48-49). Officer Knighton and her partner then approached Defendant's truck until the patrol vehicle was "nose to nose" with Defendant's truck, "maybe a car length or so away," at which time she then activated the high-beam headlights and what she referred in her testimony at the suppression hearing as the "takedown lights" located on the light bar on top of the patrol vehicle (R. 49, lines 5-17);
9. Upon activating her high-beam headlights and "takedown lights," upon Defendant's truck, Officer Knighton observed three individuals in the truck - two males and a female - who looked up towards the patrol vehicle (R. 49-50), at which time Officer Knighton stated that she "felt some movement, some secretive movement" (R. 49-50). The patrol vehicle was a marked patrol vehicle with law enforcement decals located, among other places, on the doors and the light bar on the top of the patrol vehicle (R. 53, lines 3-7). In addition to the "takedown lights," the light bar on the top of the patrol vehicle had the traditional red and blue lights in addition to grill lights in the front grill

> of the patrol vehicle (R. 53-54). Officer Knighton approached Defendant's vehicle to complete the investigation.

Under the totality of the circumstances, as set forth above, the show of authority and conduct by Officer Knighton and her partner provided Defendant with no reasonable alternative but to submit to the encounter with the officers. *Cf. United States v. Kerr*, 817 F.2d 1384, 1387 (9th Cir. 1987). The State's suggestion that Defendant could have ignored the police action and driven around the patrol car defies common sense. The freedom to depart, as the State suggests, was restrained at the moment Deputy Knighton and her partner confronted Defendant's vehicle nose-to-nose, at least partially blocking Defendant's vehicle, activating both the "take-down" lights and high-beam headlights on the marked patrol vehicle. Moreover, the confrontation with a clearly marked patrol vehicle and uniformed Officers created the unquestionable appearance of action in an official police capacity.

2. BECAUSE DEPUTY KNIGHTON DID NOT POINT TO OR ARTICULATE SPECIFIC FACTS, WHICH, TOGETHER WITH RATIONAL INFERENCES DRAWN FROM THOSE FACTS, WOULD LEAD A REASONABLE PERSON TO CONCLUDE DEFENDANT HAD COMMITTED A CRIME OR WAS ABOUT TO COMMIT A CRIME, OFFICER KNIGHTON DID NOT HAVE REASONABLE SUSPICION.

The State argues that Defendant's parking near a construction area at 9:58 p.m. combined with the Officer's knowledge of frequent illegal activity in the area justifies reasonable suspicion for the seizure. Brief of Appellee, p. 15-18. To establish the requisite reasonable suspicion to support a seizure, the officer must "point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968). Such a determination is made in light of "common sense and ordinary human experience," *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994) (quoting *United States v. King*, 990 F.2d 1553, 1562 (10th Cir. 1993)), and is made upon considering the "totality of the circumstances." *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994).

On page 16 of its Brief, the State, as part of its argument concerning reasonable suspicion, states that Officer Knighton observed Defendant's vehicle "*entering* an isolated construction site . . . ." (Emphasis Added). This statement of fact is inaccurate upon a closer review of the record. Officer Knighton, on direct examination, testified to the following:

> I observed a vehicle going westbound on Center Street half a mile or so ahead of me and they were getting *very near the construction zone* and I became curious to know where they were going down there. I saw them go and turn and park and turn off their lights -- or stop and turn off their lights and I became concerned as to why they were in that area, knowing there's a lot of construction equipment, building materials and supplies and so forth there. And so I proceeded to that location to determine why the individual had stopped there. And in the process I turned all the lights off of my vehicle.

(R. 48, lines 13-25) (Emphasis Added). Contrary to the State's representation, the record indicates that Defendant did not enter the construction area, but instead parked outside of such, which was

surrounded by moveable barricades and signs (R. 51). Further, although the construction area contained equipment and supplies, the uncontroverted testimony of Officer Knighton at the suppression hearing established that the equipment and supplies were approximately "a couple of hundred feet" from where Defendant stopped his vehicle (R. 51, lines 1-13), and that Defendant at no time during the events in question exited his vehicle (R. 52, lines 14-19).[4]

A review of the totality of the circumstances and facts surrounding the seizure by Officer Knighton and her partner, which were articulated at the suppression hearing, establishes that the seizure and investigation of Defendant's vehicle was based on Officer Knighton's curiosity "to know where they were going down there." Norwithstanding, a Fourth Amendment stop based on an "inchoate and unparticularized suspicion or 'hunch'" alone will not withstand constitutional scrutiny. *Terry*, 392 U.S. at 22, 27, 88 S.Ct. at 1880, 1883. Common sense and ordinary human experience and the totality of the circumstances warrant that Officer Knighton did not have reasonable suspicion for the seizure in the instant case inasmuch as Officer Knighton did not, at any time prior to the seizure, observe Defendant or his co-passengers engage in any type of

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[4]The State did not respond to Defendant's arguments and comparison of facts of the instant case to *State v. Carpena*, 714 P.2d 674 (Utah 1986) (per curiam), or *State v. Swanigan*, 699 P.2d 718 (Utah 1985) (per curiam). By way of reply to the State's argument concerning reasonable suspicion, Defendant reasserts the arguments concerning the facts of these cases and how such establish the lack of reasonable suspicion in the instant case. *See* Brief of Appellant, pp. 19-20.

criminal conduct. *See Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979); *State v. Carpena*, 714 P.2d 674, 675 (Utah 1986) (per curiam); and *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985) (per curiam).

CONCLUSION

Based on the foregoing, Defendant respectfully asks that this Court reverse the trial court's denial of Defendant's Motion to Suppress and remand the case for further proceedings consistent with this Court's opinion so that Defendant's constitutional right to be free from unreasonable searches and seizures might be effectuated.

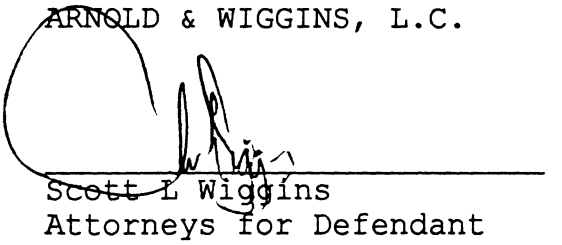
STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant issues in the instant appeal dealing with the constitutional right to be free from unreasonable searches and seizures, which are matters of continuing public interest and which, based on the facts of the instant appeal, involve issues requiring further development in the area of search and seizure. The instant case raises issues concerning the facts necessary to constitute a level two seizure and reasonable suspicion, the development of which would be for the benefit of the bar and public. Counsel for Defendant further requests that the method of disposition of the instant appeal be by

opinion designated by the Court "For Official Publication" for purposes of precedential value and development in future cases.

RESPECTFULLY SUBMITTED this 24th day of March, 1997.

ARNOLD & WIGGINS, L.C.



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CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed two (2) true and correct copies of the foregoing **Reply Brief of Appellant**, postage prepaid, to the following, on this 24th day of March, 1997.

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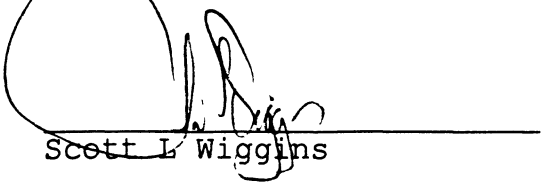

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